Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 88-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DR. JACQULYN DIGGS,

Petitioner,

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED
(AS SUBMITTED BY PETITIONER)

I. Whether the application of 42 U.S.C. §§ 2000e *et seq.* extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §§ 2000e *et seq.*, what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether Plaintiff met her burden to establish standing to assert a claim for relief under 42 U.S.C. §§ 2000e *et seq.*

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STATEMENT OF THE CASE

This is a Title VII action in which Jacqulyn Diggs, M.D., complains that Harris Hospital-Methodist,[1] in denying her medical staff privileges,[2] discriminated against her on the basis of her race and sex and retaliated against her for filing a Title VII complaint with the Office for Civil Rights.

A. Course of Proceedings and Disposition in the Courts Below

Trial on the merits before the Honorable Eldon B. Mahon, United States District Judge, began on January 26, 1986, and ended on January 29, 1986. On July 20, 1986, the district court entered judgment dismissing Diggs' action on the merits[3] and issued a memorandum opinion setting forth detailed findings of fact and conclusions of law.[4]

The district court found that Diggs was not an employee of Harris and held that she was not entitled to bring a Title VII claim.[5] Ruling on the merits, the

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[1] Harris is a private, non-profit hospital corporation owned by the Central Texas Annual Conference of the United Methodist Church. Harris has no subsidiaries other than wholly owned subsidiaries. The Central Texas Annual Conference also owns the following corporations which, with their respective subsidiaries, may be considered affiliates of Harris: Harris Methodist Health System, Harris Methodist H-E-B, and Harris Methodist Affiliated Hospitals.

[2] Harris' Board of Trustees terminated Diggs' privileges as a member of the Provisional Staff and denied her request for elevation to Full Staff status on August 28, 1984.

[3] The judgment appears in the Appendix to Diggs' Petition for Writ of Certiorari ["Petitioner's Appendix"] at App. 20.

[4] Petitioner's Appendix, at App. 21-45.

[5] Petitioner's Appendix, at App. 40-41.

district court held that even if Diggs were entitled to seek relief under Title VII, Harris had not discriminated or retaliated against her.[6]

Diggs appealed. The Fifth Circuit affirmed in an opinion discussing only Diggs' right to seek relief under Title VII.[7]

Without requesting a rehearing, Diggs petitioned this Court for a writ of certiorari. In this Court, Diggs attacks the Fifth Circuit's holding that she failed to prove the existence of an employment relationship with which the hospital allegedly interfered. She does not attack the adverse findings or conclusions of the district court on the merits of her Title VII claim.

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[6] Petitioner's Appendix, at App. 42. Judge Mahon specifically stated that Harris did not discriminate against Diggs in its decision not to elevate her to the active staff or retain her on the Provisional Staff. He also made the following findings, among others: (1) that there was no evidence that hospital personnel or members of Harris' Medical Staff committees discriminated against Diggs because she was a woman or black; (2) that there was an abundance of evidence that Diggs' treatment of patients and the quality of her work was considered suspect; (3) that Diggs was treated fairly by those who reviewed her work; and (4) that there was not a scintilla of evidence which indicated that Diggs' filing of a complaint with the Office for Civil Rights had any bearing on the decision to deny her application for privileges. Unpersuaded by Diggs' evidence of pretext, Judge Mahon found that Diggs had presented no credible evidence that Harris' reason for denying Diggs' privileges was merely a pretext.

[7] *Diggs v. Harris Hospital-Methodist, Inc.*, 847 F.2d 270 (5th Cir. 1988). The opinion appears in Petitioner's Appendix at App. 1-19.

B. Facts

Jacqulyn Diggs is a black, female physician who in 1977 received her M.D. degree and license to practice medicine in Texas.

From July 1, 1977, to June 30, 1981, Diggs trained as an intern and as an extern at John Peter Smith Hospital ["JPSH"] in Fort Worth. During her years at JPSH, Diggs entered into four one-year employment contracts which provided that she would receive a stipend, vacation and other paid leave, and various perquisites of employment (including but not limited to professional liability insurance and group hospitalization for herself and her family). The contracts also provided that Diggs' schedule and the duration and sequence of her assignments would be determined by JPSH personnel.[8] During her last three years at JPSH, Diggs received postdoctoral training in obstetrics and gynecology.

On June 5, 1981, while finishing her term at JPSH, Diggs applied for membership on the Harris Medical Staff with privileges in obstetrics and gynecology.[9] Harris granted Diggs temporary privileges immediately after receiving a favorable letter of recommendation from the third of her three references.

From July, 1981, through September 21, 1981, Diggs had temporary privileges at Harris. On September 21, 1981, Diggs' appointment as a provisional

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[8] The four employment contracts were admitted into evidence as part of Diggs' file at JPSH. DX-38, at 56-63.

[9] At or about the time Diggs applied for privileges at Harris, she also applied for privileges at other area hospitals, including All Saints Episcopal Hospital, HCA Medical Plaza Hospital, JPSH, and Huguley Memorial Medical Center.

member of the Medical Staff became effective. As a provisional member, Diggs was subject to the hospital's Criteria for Obtaining and Maintaining Staff Privileges ["the Criteria"].[10]

Diggs served on the Provisional Staff for seven months without being reviewed by the Quality Assurance Committee of the Division of Obstetrics and Gynecology ["the OB-GYN QA Committee"].[11] The record further reflects that Diggs did not receive any special attention between September 21, 1981, and April 2, 1982, from the chief of her division, from any Medical Staff committee, from any of the spon-

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[10] The Criteria changed while Diggs was on the Provisional Staff. The Criteria in effect when Diggs was admitted to the Provisional Staff were admitted into evidence as an attachment to PX-10. See Note 11, *infra*.

[11] Diggs claims that Harris and the OB-GYN QA Committee discriminated against her by not giving her an automatic six months review in March or April of 1982. In support of this contention, Diggs cites Medical Staff bylaws calling for automatic six months reviews. The bylaws (PX-2) cited were not in effect in 1982, and Diggs' own exhibit list (Tr. 194-200) identifies them as being "effective April 1983 through August, 1984." The Criteria sent to Diggs (PX-10, Criteria) when she was appointed to the Provisional Staff state that Diggs had the right to request elevation to Full Staff status after she had been on the Provisional Staff for three months and that it would be her "personal responsibility to initiate a letter requesting Full Staff membership" after she completed the applicable time and operative requirements. The Criteria (PX-87, Myers #2, Criteria) in effect after amendment of the Medical Staff bylaws in April 1983 reflect new automatic review requirements which went into effect in April 1983. *See* PX-2, Bylaws, Art. V., § 4.A., at 8; *compare* PX-10, Criteria, II.A. with PX-87, Myers #2, Criteria II.A.

sors who signed her application, from the hospital administration, or from anyone else affiliated with Harris.

On April 2, 1982, Diggs violated the terms of her provisional appointment by performing surgery in the absence of a sponsor.[12] In so doing, she made a serious case management error which she has subsequently admitted. The case was called to the attention of the OB-GYN QA Committee which recommended that Diggs' privileges be terminated. The Medical Staff's Credentials Committee concurred. On June 14, 1982, the Medical Board decided that Diggs' privileges should be terminated. Although Diggs failed to appeal, the Medical Board agreed to reinstate her on August 3, 1982, after she requested a second chance.

Within one week after being reinstated, Diggs began violating the terms of her provisional appointment by delivering babies without a sponsor present. Diggs alleges that she was not required to have a sponsor present because she had already satisfied the hospital's requirement that she perform 12 deliveries in the presence of sponsor. The record, however, does not reflect that Diggs satisfied the 12-delivery requirement during the provisional period. Moreover, the 12-delivery requirement is a minimum requirement, the Criteria stating that members of the Provisional Staff may not deliver babies without sponsors present until the chief sponsor notifies the delivery room supervisor that they may do so.[13]

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[12] PX-75, Chart 368-673; TR 1:38-41; PX-10, Criteria, II.C.8; PX-61, Transcript 06/11/84, at 16.

[13] PX-10, Criteria, II.C.9. Diggs refuses to address this requirement and has consistently denied any violation of the Cri-

In response to reports that Diggs was again violating the terms of her provisional appointment, the OB-GYN QA Committee and the Credentials Committee recommended to the Medical Board that Diggs' privileges be terminated. When the matter came before the Medical Board, Diggs explained that she tried to have sponsors present for as many cases as she could. She also admitted that she had failed to pass a portion of the board certification exam in obstetrics and gynecology and stated that she had applied to retake the exam during the next year. On October 21, 1982, the Medical Board advised the OB-GYN QA Committee that Diggs would be permitted to retain provisional status with the stipulation that she attend postgraduate courses in preparation for the examination she said she would take.[14]

In February, 1983, the OB-GYN QA Committee reviewed the charts of patients treated by Diggs between November 1982 and January 1983. Because of inconsistencies between Diggs' notes and nurses' notes with respect to one of the charts, the Committee requested further information from Diggs and from the nurses involved. The nurses promptly responded to the Committee's inquiry. Diggs, however, did not respond to the Committee's March 14, 1983, letter to her until May 23, some 10 days after she had been advised by the Credentials Committee that it would

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teria, suggesting instead that members of the nursing staff reported her because they were prejudiced against her or incited to act by physicians who were prejudiced against her.

[14] Although Diggs may have applied to take the exam, the record reflects that she either did not take the exam or failed it a second time.

not consider a review of her privileges until she responded to the OB-GYN QA Committee inquiry.[15]

The patient chart and nurses' reports suggested that Diggs had ordered a caesarian section for a patient she had not examined. The patient had been admitted by Dr. Robert Henry, a black physician for whom Diggs was covering.[16] After Diggs scheduled the C-section, and while the patient was in labor, nurses contacted Dr. Charles Langham.[17] Langham examined the patient and artificially ruptured her membranes. Diggs then delivered the baby by spontaneous vaginal delivery. From the chart and nurses' notes, it appeared that Langham had averted an unnecessary C-section. Although the C-section had been scheduled, Diggs denies that she would have performed the C-section without first examining the patient.

From February through May, 1983, Diggs did not treat patients at Harris. Having no new charts to review, and having received no reply from Diggs to its earlier inquiry, the OB-GYN QA Committee had

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[15] Diggs offered into evidence a Harris envelope showing an April 11, 1983, postmark and stated that she received the OB-GYN QA Committee inquiry in that envelope. Whether Diggs received the inquiry in March or April, she did not respond to it until May 23.

[16] Dr. Henry was a member of the OB-GYN QA Committee and voted to recommend that Diggs' privileges be terminated the last time her performance was reviewed by that committee.

[17] Dr. Langham, also a black physician, was the chairman of the All Saints OB-GYN Department when Diggs was terminated from the Medical Staff at All Saints on June 6, 1983. Dr. Byrd, one of Diggs' witnesses, later blamed Langham for Diggs' downfall at All Saints. TR 3:118-119.

nothing to review with respect to Diggs when it met on May 17, 1983.

Meanwhile, Diggs was encountering problems at other hospitals. On June 6, 1983, All Saints terminated her privileges despite her attorney's threat to file a discrimination suit if her request for privileges were denied.[18] On August 30, 1983, Medical Plaza suspended Diggs' privileges. With her privileges being cut off at other area hospitals,[19] Diggs needed to secure her privileges at Harris. On September 1, 1983, two days after being suspended at Medical Plaza, Diggs filed a complaint with the Office for Civil Rights alleging discriminatory delay by Harris in the processing of her application.

Although she alleged delay by Harris, Diggs herself did nothing to speed up the consideration of her application. The Criteria reflect that a Provisional Staff member's chief sponsor is supposed to play a central role in the evaluation process and is charged with responsibility for reviewing each of the charts of the sponsored physician before the Credentials Committee recommends the physician for elevation. Diggs, how-

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[18] The letter from Diggs' attorney is in evidence as part of her file at All Saints. DX-31, at 20-22.

[19] The record reflects that Diggs was dropped from the JPSH Medical Staff when her six-month provisional period ended in late 1981 or early 1982. In October 1982, Diggs advised the Harris Medical Board that she was still practicing at All Saints but was not practicing much at Medical Plaza or Saint Joseph. All Saints terminated Diggs' privileges on June 6, 1983. On August 30, 1983, Medical Plaza suspended Diggs' privileges. On April 27, 1984, Saint Joseph advised Diggs that her privileges there had been terminated. Harris did not terminate her privileges until August 28, 1984.

ever, did not have a functioning chief sponsor during most of her term on the Provisional Staff. The record reflects that she had no chief sponsor from September 6, 1982, until June 23, 1983, at the earliest, and in all likelihood from September 6, 1982, until an unspecified date after September 9, 1983.[20] Obtaining sponsors and maintaining satisfactory working relationships with sponsors are duties placed on the physician seeking staff privileges, not the hospital. No testimony or documentary evidence demonstrates the efforts, if any, taken by Diggs before September 9, 1983, to obtain a new chief sponsor. No evidence indicates that the sponsors Diggs ultimately recruited would not have agreed to sponsor her if asked.

On October 4, 1983, Diggs formally requested elevation to Full Staff status. On November 11, 1983, Dr. Averhart submitted seven evaluation forms favorable to Diggs. In December, Dr. Byrd submitted five more. Meanwhile, Diggs secured a series of de-

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[20] The chief sponsor designated on Diggs' application for staff privileges was Dr. Robert W. Dowling. The record reflects that Diggs knew or should have known by September 6, 1982, that Dowling was no longer willing to serve as one of her sponsors. PX-23. The record does not reflect when Diggs obtained a new chief sponsor. Diggs testified that she recruited Drs. Vernon W. Averhart, who replaced Dowling as chief sponsor, and Wilbur Michael Byrd as sponsors after another sponsor, Dr. James McCoy, formally resigned on June 23, 1983. On September 9, 1983, the chairman of the Credentials Committee reported to the Committee that Diggs had been asked to furnish the names of physicians who were willing to serve as her sponsors. On November 11, 1983, Averhart submitted to the medical staff office seven evaluation forms dated November 7, 1983. Therefore, it appears that Averhart became Diggs' chief sponsor between September 9, 1983, and November 7, 1983.

lays which resulted in the postponement of any personal appearance by her before the OB-GYN QA Committee until February 7, 1984. After that meeting, the OB-GYN QA Committee unanimously recommended that Diggs' privileges be terminated. Diggs personally appeared before the Credentials Committee and the Medical Board and both agreed that her privileges should be terminated. On August 28, 1984, the Board of Trustees officially terminated Diggs' provisional privileges and refused to elevate her to full staff status.

REASONS FOR DENYING THE WRIT

I. DIGGS FAILED TO PROVE THE MERITS OF HER CASE AND IS THEREFORE NOT ENTITLED TO TITLE VII RELIEF.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DIGGS FAILED TO PROVE THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP WITH WHICH HARRIS ALLEGEDLY INTERFERED.

SUMMARY OF THE ARGUMENT

I. ON THE MERITS

This case was fully tried and decided on the merits. After a careful review of the evidence, the district court determined that Diggs did not prove her discrimination or retaliation claims.

In this Court, Diggs does not seek review of the district court's findings or conclusions on the merits. The evidence, discussed extensively by the parties in the court of appeals, reflects that Diggs' case is based primarily upon (1) her misreading of Medical Staff Bylaws and the Criteria which applied to her as a member of the Provisional Staff and (2) her attri-

bution of discriminatory intent to hospital personnel and Medical Staff committee members who complied with hospital rules and regulations.

Diggs' treatment of patients at Harris was suspect and her irresponsible refusal to comply with sponsorship requirements placed her in a position where she could not satisfactorily explain the patient care decisions she made. Her choice of treatments and the steps she followed (or failed to follow) in making those decisions were such that the OB-GYN QA Committee, the Credentials Committee, the Medical Board, and the Board of Trustees were justified in finding that her practice was inconsistent with community standards. Diggs was denied privileges because there were substantial reasons for continued concern with her judgment, sequence of care, and comprehension of appropriate case management.

Diggs was not a victim of discrimination or retaliation. Harris articulated a legitimate, nondiscriminatory reason for its actions. Diggs failed to persuade the district court that pretext was involved. Because Diggs is not entitled to relief on the merits, her standing is irrelevant.

II. TITLE VII STANDING

Diggs is a physician in the private practice of medicine. At trial, she testified that she was not employed by Harris.

Although nothing in Title VII exempts hospitals from its coverage or provides that physicians per se may not be employees, the provisions of Title VII apply only to those physicians who are employees or seeking employment. Diggs was not such a physician.

Under the common law control test for distinguishing between employees and independent contractors, Diggs would not be classified as an employee of Harris. She did not provide services for Harris, and Harris did not control the manner in which she diagnosed or treated her patients.

Under the economic realities test applied in Fair Labor Standards Act and Social Security Act cases, Diggs would not be classified as a Harris employee. Diggs did not provide services to Harris, but instead utilized Harris facilities to provide services to those patients she chose to admit there. Not only did Diggs determine which patients to admit to Harris but she also determined what treatment they would receive while on the hospital premises.

Diggs rendered professional services for her patients in order to make a living for herself. No evidence suggests that Harris asked Diggs to perform services for anyone or told Diggs what services to perform, what fees to charge for the services she rendered, or what to do with the fees she collected. No evidence suggests that Harris participated in the collection of Diggs' fees or shared in those fees. As a physician in the private practice of medicine, Diggs had no duties to Harris, was independent of Harris, and had no relationship with Harris other than the right to admit patients and render services to them on Harris' premises.

Although obstetricians and gynecologists may need hospital affiliations in order to perform some of the procedures which are a part of their practice, Diggs was never dependent upon Harris. She obtained staff privileges and practiced at a number of area hospitals.

From February through May of 1983, she did not even treat patients at Harris.

The economic reality of Diggs' situation was that she needed access to hospital facilities where she could perform some of the procedures she wanted to perform, but her need for hospital facilities did not make her an employee of the many hospitals where she practiced. To the extent that Diggs could be described as "dependent" upon Harris, she became dependent only because other hospitals had earlier terminated or suspended her privileges.

In short, Diggs was not in economic reality a hospital employee artificially disguised as an independent contractor. She was her own master.

Although Harris is a Title VII employer, Harris never hired Diggs as an employee. Harris never discharged Diggs as an employee. Not having employed Diggs, Harris did not discriminate against her with respect to her compensation, terms, conditions, or privileges of employment. Moreover, Harris did not discriminate against Diggs *as an employee or applicant for employment* because she made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under Title VII. The allegations Diggs failed to prove would not have entitled her to Title VII relief even if the district court had believed them.

Diggs nevertheless alleges that she has standing because Harris in some manner interfered with her employment opportunities with her patients. Although patients may pay their physicians, the relationship between a physician and a patient is not one of employment. For the purposes of Title VII, the term

employee means "an individual employed by an employer." For Title VII purposes, however, an individual is not an employer unless he or she employs 15 or more employees. A physician providing services to hundreds of individual patients is not an employee of any of them, and Congress, in enacting Title VII, did not intend that those patients who happen to employ 15 or more employees in their businesses be classified as employers of the physicians they consult to treat their personal needs.

The Fifth Circuit correctly ruled that Diggs failed to prove the existence of an employment relationship with which Harris allegedly interfered. Diggs' right to relief, if any, did not arise under Title VII, and Diggs was not and is not entitled to seek Title VII remedies.

ARGUMENT

I. DIGGS FAILED TO PROVE THE MERITS OF HER CASE AND IS THEREFORE NOT ENTITLED TO TITLE VII RELIEF.

This case was tried and adjudicated on the merits. Although Harris moved for dismissal under Rule 41(b), the district court refused to dismiss the case on standing grounds and proceeded with the trial on the merits. Having heard the evidence, the district court found that Harris had not discriminated against Diggs, that Harris did not retaliate against Diggs for filing a complaint with the Office for Civil Rights, that Harris had articulated a legitimate, nondiscriminatory reason for its actions with respect to Diggs, and that Diggs' evidence of pretext was not credible.

On appeal, the parties discussed the evidence at length in their respective briefs. In the court of

appeals, Diggs' recitation of facts was inaccurate, incomplete, artificially skewed in her favor, and thoroughly misleading. The same is true of Diggs' presentation to this Court. For example, Diggs would have this Court believe that in July, 1982, following the first review of her cases by the OB-GYN QA Committee, the Committee recommended that her privileges be terminated solely because a sponsor did not "scrub" with her on one of her cases. She would have the Court believe that no one told her that sponsors were required to scrub with her.[21] She would have the Court infer that the OB-GYN QA Committee penalized her because she failed to comply with a minor technical requirement. She does not mention the Criteria for Obtaining and Maintaining Staff Privileges which provide that Provisional Staff members are not to perform surgery without a sponsor present until their chief sponsor advises the operating room supervisor that they may do so.[22] She fails to mention that on April 2, 1982, she performed surgery without a sponsor present.[23] She fails to state that while performing surgery, she made a serious case management blunder which could have resulted in a negative patient outcome, a mistake which she herself later admitted.[24]

Diggs complains that in 1982, the OB-GYN QA Committee did not comply with the Harris Medical Staff Bylaws because it did not give her an automatic

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[21] Pet. for Cert., at 9-10.

[22] PX-10, Criteria, II.C.7.

[23] PX-75, Chart 368-673; TR 1:38-41.

[24] PX-61, Transcript, 06/11/84, at 16.

six months evaluation.[25] She would have this Court believe that the failure resulted from an impermissible, discriminatory animus. She does not mention that the bylaw in question was part of the April *1983* Bylaws.[26] She does not mention that the Criteria in effect when she was admitted to the Provisional Staff did not provide for automatic reviews but required Provisional Staff members to request evaluation when they had completed the requirements for elevation to Full Staff.[27] She provided no proof that she was not reviewed at the same time and in the same manner as other physicians admitted to the Provisional Staff about the same time she was.

Diggs blames Harris for delaying the processing of her application and refuses to accept blame for failing to maintain suitable working relationships with the physicians who sponsored her.

At trial, Diggs failed to show that the Medical Staff Committees did not have legitimate concerns about the manner in which she practiced medicine. Although she suggests that as time went on she made fewer mistakes, she failed to show that the Medical Staff Committees had no reason to have continued concern with her judgment, with her sequence of care, and with her comprehension of appropriate case management. In some cases, Diggs admitted her errors. In others, she refused to admit that she had erred but suggested that she would follow different procedures or prescribe a different course of treatment if similar cases presented themselves.

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[25] Pet. for Cert., at 9.

[26] PX-2. *See* note 11, *supra.*

[27] PX-10, Criteria, II.A. *See* note 11, *supra.*

The differences between what the record reflects and what Diggs continues to portray as fact in this case explain why the district court's findings of fact vary so greatly from Diggs' version of reality. This Court can rest assured that the district court's findings of fact on the merits are fully supported by the record.

Diggs' treatment of patients at Harris was suspect. Her refusal to comply with sponsorship requirements placed her in a position where she could not satisfactorily explain the patient care decisions she made. The district court was correct, and not clearly erroneous, in finding that Diggs failed to prove discrimination or retaliation.

Harris articulated a legitimate, nondiscriminatory reason for its actions. At trial, Diggs failed to persuade the district court that the reasons given by Harris were pretexts, and the district court expressly found that Diggs' evidence of pretext was not credible. Under these circumstances, whether Diggs had standing to sue under Title VII is academic and irrelevant. Diggs has not complained in this Court of alleged errors by the district court in ruling on the merits. A ruling in Diggs' favor on her standing as a Title VII plaintiff would have no bearing on the ultimate outcome of this case.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DIGGS FAILED TO PROVE THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP WITH WHICH HARRIS ALLEGEDLY INTERFERED.

Title VII does not cover all relationships between employers and the various parties with whom employers deal. Title VII deals with employment relationships. Insofar as employers are concerned, Title

VII deals with relationships between employers and their employees and individuals seeking to become their employees. Title VII also deals with the various individuals who seek or obtain services from employment agencies, who obtain or seek to obtain union membership, or who participate or seek to participate in various training programs.

Diggs was not an employee of Harris. At trial, she testified that she was not.[28]

Although nothing in Title VII exempts hospitals from its coverage, nothing in Title VII suggests that physicians who obtain staff privileges thereby become hospital employees. Physicians who work for hospitals as salaried employees, and physicians who provide services to hospitals as residents, interns, and externs in exchange for training, a stipend, and a variety of traditional employment perquisites, may not be fairly analogized to physicians who are granted staff privileges but do not work for the hospital.[29]

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[28] On cross-examination, Diggs testified on this subject as follows:

Q: Dr. Diggs, you at no time while you were at Harris Hospital were you an employee of the hospital, were you?

A: No.

Q: At all times you were a physician in the private practice of medicine, is that correct?

A: That's correct.

TR 1:107. Dr. Garrett, one of Diggs' witnesses, also testified that with the exception of pathologists and radiologists, the physicians who served on Medical Staff committees were not employees of the hospital. TR 3:29-30.

[29] In the debate over proposed Amendment No. 838 to the

In construing and applying social legislation relating to employers and employees, this Court and the courts of appeals have applied three major tests for distinguishing between employees, persons whom Congress defined or intended to be treated as employees for the purposes of specific social legislation, and those individuals who are genuinely in business for themselves and should not be treated as employees. Diggs would not be classified as an employee under any of the tests.

The first test is sometimes referred to as the common law control test. This test has been applied by

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Equal Employment Opportunities Act of 1971 (S. 2515), Senator Williams stated that "A substantial number of the physicians considered employed by public and private hospitals are interns and residents." 118 Cong. Rec. 3801 (1972). The words "considered employed" imply that only some of the physicians who practice at hospitals should, for Title VII purposes, be considered employees. Senator Williams also mentioned hospital-based physicians as being among those who might be considered employees. Because Senator Williams was addressing his remarks in opposition to an amendment that would have exempted hospitals from Title VII with respect to all physician-employees rather than an amendment purporting to define which physicians were and were not considered to be employees, his remarks are at best indicators of possible Congressional intent. For a discussion of the treatment of house staff physicians (interns, residents, and clinical fellows participating in hospital-based training programs, providing medical services to patients subject to the direction and control of the hospitals, receiving salaries, stipends, and other benefits, and being subject to state statutes pertaining to worker's compensation and unemployment benefits) under the 1974 amendments to the National Labor Relations Act, *see Physicians National House Staff Association v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980) (*en banc*), *cert. denied* 450 U.S. 917 (1981).

some courts in Title VII cases,[30] although it is more often applied in National Labor Relations Act contexts.[31] The test is applied in National Labor Relations Act cases because Congress, reacting adversely to prior decisions of this Court, amended the legislation in 1947 so that general agency principles would be applied in distinguishing between employees and independent contractors.[32]

If general agency principles are held to be the sole determinant of Diggs' employment status, Diggs cannot be classified as an employee.[33]

The second test applied is the economic realities test. In *N.L.R.B. v. Hearst Publications, Inc.*,[34] this Court held that under the National Labor Relations Act, common law agency or control tests should not

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[30] *See, e.g., Smith v. Dutra Trucking Co.*, 410 F.Supp. 513 (N.D. Cal. 1976). This case, cited by Diggs in her brief, states that nothing in the legislative history of Title VII indicates a Congressional intent to construe the term "employee" in any manner other than in accordance with common law agency principles. Diggs has not cited any circuit level authority purporting to apply this test as the sole test to be applied in determining employee status under Title VII.

[31] *See e.g., N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968).

[32] *Id.*, at 256.

[33] *See, e.g., Hale v. Sheikholeslam*, 742 F.2d 1205 (5th Cir. 1984), a medical malpractice case in which the court held that a physician with staff privileges was an independent contractor, selected by the patient, and having no employer-employee, principal-agent, or similar legal relationship to the hospital. *See also Jeffcoat v. Phillips*, 534 S.W.2d 168, 173 (Tex. Civ. App. -- Houston 1976, writ ref'd n.r.e.).

[34] 322 U.S. 111, 128 (1944).

be applied in determining the existence of employment relationships. Instead, an employment relationship should be found to exist if the economic facts of the relationship make it more nearly one of employment than one of independent business enterprise with respect to the ends sought to be accomplished by the legislation. In *United States v. Silk,*[35] this Court applied the economic realities test to Social Security Act cases. In *Rutherford Food Corp. v. McComb,*[36] the Court applied the economic realities test to Fair Labor Standards Act cases. In *Bartels v. Birmingham,*[37] the Court restated the test for Social Security Act purposes, stating that ". . . [I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."[38]

Because the economic realities test is amorphous and does not exclude consideration of common law control and agency factors, one cannot meaningfully distinguish between the pure "economic realities" test and the third test applied in Title VII cases to determine employee status: the hybrid "economic realities/common law control" test applied by the Fifth Circuit in this case.[39]

As a matter of economic reality, Diggs was not an employee of Harris. She did not render service *to*

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[35] 331 U.S. 704, 713 (1947).

[36] 331 U.S. 722 (1947).

[37] 332 U.S. 126 (1947).

[38] *Id.* at 130.

[39] *Diggs v. Harris Hospital-Methodist, Inc., supra,* 847 F.2d at 272. *See also Spirides v. Reinhardt,* 613 F.2d 826, 831 (D.C. Cir. 1979).

Harris. Instead, she used the hospital facilities if and when it served her purpose in treating specific patients. She was not in any way comparable to the newsboys in *N.L.R.B. v. Hearst Publications, Inc.*, who worked continuously and regularly as a part of the distribution chain through which the publisher circulated its papers, controlling buying and selling prices, dictating hours of work, and supervising the newsboys' sales efforts. Diggs cannot fairly compare herself to the coal unloaders in *United States v. Silk* who unloaded coal from railroad cars and delivered it to the Albert Silk Coal Co. with little opportunity for profit other than for the manual labor they performed, or to the slaughterhouse boners in *Rutherford Food Corp. v. McComb* who performed what was, in effect, a specialty job on an assembly line and were paid on what amounted to a piecework basis. Diggs was and is, from an economic point of view, an entrepreneur performing medical services for her patients on an independent contract basis, with the amount of her profits depending upon her skill and initiative, not on any employer's assignment of work to her.

Diggs was not dependent upon Harris. At the same time she applied for staff privileges at Harris, she also applied for staff privileges at other area hospitals. She practiced at other hospitals and admitted no patients at Harris from February, 1983, through May, 1983. Although Diggs needed to have some hospital privileges in order to perform some of the medical and surgical procedures she desired to perform, she was not dependent upon any one of the various hospitals at which she practiced. To the extent that Diggs could be described as "dependent" upon Harris, she

was dependent only because other area hospitals had earlier terminated or suspended her privileges.

In short, Diggs was not a hospital employee disguised as an independent contractor. She was an independent contractor under the economic realities test and under the hybrid economic realities/common law control test applied by the Fifth Circuit in this case.[40]

In *Doe ex rel. Doe v. St. Joseph's Hospital,*[41] a divided panel of the Seventh Circuit held that it was not necessary for a physician whose staff privileges were terminated to show that she was an employee of the hospital in order to state a Title VII claim. That case, unlike the present case, was not tried on the merits and merely holds that the plaintiff stated a claim under Title VII. The case does not support the proposition that the physician was an employee of the hospital, but instead suggests the existence of an amorphous Title VII claim for interference with employment opportunities.[42]

Because Diggs failed to prove that she was an employee of Harris, she contends in the alternative that

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[40] For other cases holding that physicians having voluntary staff privileges are not properly classified as employees having the right to bring Title VII suits, *see Nanavati v. Burdette Tomlin Memorial Hospital,* 42 B.N.A. F.E.P. Cas. 197 (D. N.J. 1986); *Amro v. St. Luke's Hospital,* 39 B.N.A. F.E.P. Cas. 1574 (E.D. Pa. 1986); *Beverley v. Douglas,* 591 F.Supp. 1321 (S.D. N.Y. 1984).

[41] 788 F.2D 411 (7th Cir. 1986).

[42] *See also Pao v. Holy Redeemer Hospital,* 547 F.Supp. 484 (E.D. Pa. 1982) (holding that the plaintiff stated a claim under Title VII in alleging that the hospital, in denying staff privileges, deprived him access to prospective patients who were his ultimate employers).

she was employed by her patients and that Harris, in terminating her staff privileges, interfered with her employment opportunities. Title VII, however, does not state that it is an unfair labor practice for an employer to interfere with the employment opportunities of persons who have never been employed or sought employment with the employer. Unlawful interference with employment opportunities may constitute a tort, or it may constitute a violation of other civil rights laws, but unlawful interference with employment opportunities does not constitute an unlawful employment practice within the Congressional definitions of that term.[43]

The cases cited by Diggs in support of an expansionist reading of Title VII rely upon the statutory provision that it is an unlawful employment practice for an employer to discriminate against any individual *with respect to terms, conditions, or privileges of his employment.* These cases are in conflict with this Court's statement in *Hishon v. King & Spalding*[44] that the refusal to hire someone does *not* concern the "terms, conditions, or privileges of employment."[45] It is the contractual relationship of employment which triggers the provision of Title VII governing the "terms, conditions, or privileges of employment."[46] Therefore, that provision has nothing to do with interference by non-employers with an individual's employment opportunities with third parties.

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[43] 42 U.S.C.A. §§ 2000e-2 and 2000e-3 (1981).

[44] 467 U.S. 69 (1984).

[45] *Id.* at 74, n. 5.

[46] *Id.* at 74.

Furthermore, the notion that physicians are employed by patients for Title VII purposes is also wrong.[47] To begin with, patients do not exercise the kind of control over physicians which would result in classification of the patient as an employer under the common law control test. Malpractice lawyers would find quite novel the notion that the patient, as "employer" of a physician, should be liable to himself for the injuries inflicted as a result of the negligent conduct of his physician-servant. As a matter of economic reality, physicians are not dependent upon the patients they serve except to the extent that physicians without patients will not receive revenues for professional services rendered.

Title VII, moreover, has a special, limited definition of the words "employer" and "employee." An employer, to be a Title VII employer, must employ at least 15 employees.[48] An employee, to be a Title VII employee, must be employed by a Title VII employer who employs at least 15 employees.[49] These definitions, which serve the function of limiting Title VII's reach, negate the notion that individual patients should be considered as "employers" of physicians. A physician providing services to hundreds of individual patients is not the servant of any of them, and Congress, in enacting Title VII, did not intend that those patients who happen to employ 15 or more employees

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[47] Dr. Garrett, one of Diggs' witnesses, specifically stated that he did not consider himself to be an employee of his patients. TR 3:42.

[48] 42 U.S.C.A. § 2000e(b) (1981).

[49] 42 U.S.C.A. § 2000e(f) (1981).

in their businesses be classified as employers of the physicians they consult for their personal needs.[50]

The Fifth Circuit correctly ruled that Diggs failed to prove the existence of an employment relationship with which Harris allegedly interfered. Diggs' right to relief, if any, did not arise under Title VII. Diggs was not and is not entitled to seek Title VII remedies.[51]

CONCLUSION

For the reasons stated above, Harris respectfully submits that Diggs' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[50] Diggs made no attempt to prove that any of her patients employed 15 or more employees.

[51] Harris states no opinion as to whether or not Diggs would have had standing to seek relief under other theories.